

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

PROJECT VOTE, et al.,	:	Case No. 1:08CV02266
Plaintiffs,	:	Judge James S. Gwin
vs.	:	
MADISON COUNTY BOARD OF ELECTIONS, et al.,	:	
Defendants.	:	

**REPLY MEMORANDUM IN SUPPORT OF
MOTION OF DEFENDANT MADISON COUNTY BOARD OF ELECTIONS
TO DISMISS, OR IN THE ALTERNATIVE, TRANSFER VENUE**

Despite the considerable talents of the nine law firms, college professors and attorneys from New York City, Washington, D.C., Atlanta, Massachusetts and Ohio who represent plaintiffs, Defendant Madison County Board of Elections’ (the “Board” or “Madison County”) motion to dismiss or, alternatively, transfer venue must be granted for the simple reason that this case should have been brought in the Southern District of Ohio, Eastern Division. As established below, all of the defendants are residents of the Southern District of Ohio. All events giving rise to the claims occurred in the Southern District of Ohio. Nearly all witnesses and documents are

located in the Southern District of Ohio. At the time that this case was filed (as plaintiffs admit in their complaint) another case concerning the same events was already pending before the Ohio Supreme Court in Columbus, Ohio. Additionally, another case concerning the same events is still pending in the Southern District of Ohio, Eastern Division, and the Southern District has denied the motion to transfer that case to this Court. Pursuant to 28 U.S.C. § 1406 and this Court's rules, venue is improper in this district and this action should be dismissed or transferred.

ARGUMENT

I. This Court Is Not The Proper Venue For This Action

A. The Defendants Do Not Reside Within This Court's Geographic Territory

In a federal question suit, venue is proper in “a judicial district where any defendant resides, if all defendants reside in the same State . . . [or in] a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred” 28 U.S.C. § 1391(b)(1)-(2). Plaintiffs bear the burden of establishing that venue is proper once an objection to venue has been raised, and must demonstrate that venue is proper for each claim asserted in their complaint. *GCG Austin, Ltd. v. City of Springboro, Ohio*, 284 F. Supp. 2d 927, 929 (S.D. Ohio 2003), citing Wright, Miller & Cooper, Federal Practice and Procedure; Jurisdiction 2d § 3803.

In this case, plaintiffs' complaint alleges venue in this district is proper because “a substantial part of the events or omissions giving rise to the claims alleged herein occurred, and will continue to occur, in this district.” (Doc. 1, p. 6 ¶ 5). As discussed below (see section I.B), this assertion is untrue and is directly contradicted by plaintiffs' own pleadings. Additionally, there are no allegations in the complaint with regard to the residence of any of the defendants.

However, based on the face of the complaint and established law of the Sixth Circuit, all defendants reside in the Southern District of Ohio, Eastern Division.

There are only two defendants in this case: the Madison County Board of Elections and Ohio Secretary of State Jennifer Brunner (“Secretary Brunner”). Although the complaint fails to allege the residence of the Board, it is clear from the allegations that the Madison County Board of Elections is situated in Madison County, Ohio and “is charged with conducting, managing and overseeing elections within its geographical jurisdiction” of Madison County, Ohio. (Doc. 1, ¶ 2(a)). As this Court’s rules clearly indicate, matters involving Madison County and election activities within Madison County, Ohio belong in the Southern District of Ohio, and venue is not proper pursuant to 28 U.S.C. § 1391(b) in the Northern District of Ohio. Local Rule 3.8 (omitting, for venue purposes, Madison and Franklin Counties as counties served by the Northern District Court of Ohio). *See also* S.D. Ohio Local Rule 82.1 (asserting venue over Madison and Franklin Counties as counties served by the Southern District Court of Ohio, Eastern Division); *GCG Austin, Ltd.*, 284 F. Supp. 2d at 929 (“if a defendant is a resident of the Southern District of Ohio, as is the case herein, the action must be filed in the federal district court serving the county of which the defendant is a resident.”)

With regard to Secretary Brunner, while plaintiffs assert in their response brief that Secretary Brunner “resides” in the Northern District of Ohio because “her counsel informed Plaintiffs that she maintains an office in Northern District of Ohio” (Doc. 37, p. 12), the Complaint is devoid of any allegations regarding where Secretary Brunner resides or maintains offices. In fact, there are no allegations in the Complaint with regard to Secretary Brunner that would establish proper venue in this district, and there is nothing properly before this Court upon which the Court can make such a finding for purposes of venue. (See Doc. 1, ¶ 4(b)).

Moreover, the law of the Sixth Circuit is clear with regard to the residence of Ohio public officers, such as Secretary Brunner, for purposes of venue. The Sixth Circuit has held that “[w]here a public official is a party to an action in his official capacity, he resides in the judicial district where he maintains his official residence, that is, where he performs his official duties.” *O’Neill v. Battisti*, 472 F.2d 789, 791 (6th Cir. 1972) (finding suit against the justices of the Supreme Court of Ohio must be brought in the Southern District); *GCG Austin, Ltd.*, supra (concluding suit against the City of Springboro must be filed where its governing bodies perform their duties); see also *City of Fostoria v. Fox*, 54 N.E. 370 (Ohio 1899) (concluding that a city resides where its municipal offices and government are located). Secretary Brunner governs election matters for the State of Ohio from her official (and presumably main) office located in Columbus. The directives at issues in the case were issued from the Secretary’s official office in Columbus. Thus, plaintiffs’ unsupported assertion that legal counsel for Secretary Brunner told them that she has an office in the Northern District is irrelevant. Under controlling law of the Sixth Circuit, neither defendant resides within the geographic territory served by the Northern District, nor do plaintiffs assert in the complaint that defendants reside within the Northern District. (Doc. 1, ¶ 4.) The Board resides in Madison County, Ohio, and Secretary of State Brunner’s official office is located in Columbus in Franklin County, Ohio. Plaintiffs incorrectly filed suit in the Northern District of Ohio. Because all defendants reside in the Southern District of Ohio, venue is proper under 28 U.S.C. § 1391(b)(1) only in the Southern District of Ohio, Eastern Division.

B. No Part Of The Events Giving Rise To The Claims Occurred In This District

The sole basis for venue asserted in the complaint is because a substantial part of the events giving rise to the claims occurred and will continue to occur in this district – an allegation

which, on its face, cannot be true because Madison County is in the Southern District of Ohio. Venue should be located in the Southern District where all of the events related to defendants' actions occurred.

Contrary to plaintiffs' assertions in paragraph 4 of their complaint, *no* part of the events giving rise to the complaint occurred within the geographic area served by the Northern District of Ohio. Indeed, despite the rhetoric in plaintiffs' response brief about the "chilling effect on the voting rights of citizens throughout the State of Ohio" and the unfounded suggestion that "every voter and every voter registration group throughout Ohio was injured by the conduct" of Madison County with regard to a five-day registration window, the simple fact is that the complaint contains no such allegations. As the complaint reveals, the events central to this suit – (1) the intention of the Board not to permit same-day registration and absentee voting *in Madison County, Ohio*; (2) the action of the Madison County Prosecuting Attorney, Stephen J. Pronai, in advising the Board that Ohio law does not permit same-day registration and absentee voting; and (3) the alleged inaction of Secretary of State Brunner *in regard to Madison County*. (Doc. 1, ¶¶ 16, 18, 24, 25 & 40) – all took place in the Southern District. Plaintiffs fail to provide any explanation regarding how voting *in Madison County* occurs within the territory of the Northern District. And plaintiffs fail to provide any explanation as to how Secretary Brunner's alleged inaction in either *Franklin County* (where she is located) or *Madison County* occur within the territory of the Northern District. That is because there is no explanation.

Moreover, plaintiffs admit that "the Madison County Board of Elections was the only county of which Plaintiffs are aware that refused to abide by the Secretary of State's interpretation of Ohio law," – the main action complained of by plaintiffs. (Doc. 37, p. 3). The complaint is devoid of a single allegation that any other board of elections will prevent (or

prevented) newly registered voters from voting an absent voter's ballot. Indeed, the complaint specifically alleges that it is Madison County and Madison County alone that "is applying a presumption of non-residency to newly registered voters." (Doc. 1 at ¶25; see also ¶¶ 16, 18 & 24). Telling, only Madison County is sought to be enjoined "to comply with state law and Ohio Secretary of State directives 2008-63 and 2008-91," in the prayer for relief. (Doc. 1, ¶45(c)). Plaintiffs did not allege a single event occurring in the Northern District that gave rise to their claims, much less a "substantial part" part of their claims. Venue, therefore, is improper in the Northern District under 28 U.S.C. § 1391(b)(2). Pursuant to 28 U.S.C. § 1406(a), this case should be dismissed or transferred to the Southern District, Eastern Division.

C. Under 28 U.S.C. § 1404(a), Convenience Necessitates Transfer Of This Case

Even if this Court were to find venue proper in the Northern District, 28 U.S.C. § 1404(a) still necessitates a transfer to the Southern District of Ohio, Eastern Division. Section 1404 provides: "(a) For the convenience of the parties and witnesses, in the interests of justice, a district court may transfer any civil action to any other district or division where it might have been brought." A district court may transfer venue if: (1) venue is proper in both the transferor and transferee court; (2) the transfer is done for the convenience of the parties and witnesses; and (3) the transfer is in the interests of justice. *Central States Southeast & Southwest Areas Health & Welfare Fund v. Guarantee Trust Life Ins. Co.*, 8 F. Supp. 2d 1008, 1010-11 (N.D. Ohio 1998).

Clearly, this action could have been brought in the Southern District of Ohio since all of the defendants reside there and all of the underlying events occurred there. 28 U.S.C. § 1391(b) (1)-(2). All of the witnesses related to the Madison County Board's actions, the Madison County Prosecutor's actions and the directives issued by Secretary Brunner reside either in Central Ohio

or Madison County. Plaintiffs admit that Plaintiff Penix is a Madison County resident (Doc. 37, p. 5), and that the reason she is a plaintiff is because she seeks to challenge “Madison County’s announced intention to treat her ballot as void” because “[a]bsent relief requiring the Madison County Board of Elections to accept her registration and absentee ballot,” Ms. Penix would not be able to register and request and submit an absentee ballot without waiting 30 days after registering, as she wished. (Doc. 37, p. 5). Again, as a resident of Madison County, Ms. Penix should have brought any claims that she had against the Board in the Southern District, not this Court. Thus, the convenience of the parties and of the witnesses – the most significant factors in a section 1404(a) determination – strongly weigh in favor of transfer of this action to the Southern District.

The public’s interest and private litigants’ interests are also important factors calling for transfer to the Southern District. Courts are to consider both the private interest of the litigants and the public’s interest in the administration of justice. *See Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508-09 (1947). The litigants’ interests in this case, including all of the events complained of, occurred in the Southern District. The directives at issue were formulated at Secretary Brunner’s official office in Columbus, and are of concern to qualified electors in Madison County as well as the Board. The Madison County Board of Election has a strong interest in vindicating its actions in the Southern District, where its electors reside. Most of the records in this action are also likely to come from Madison County, Ohio.

Finally, the interests of justice are served by eliminating forum-shopping and by litigating controversies in their locale, which is the Southern District. Unfortunately, a cursory review of the complaint shows that it is essentially a collusive lawsuit between several advocacy groups and Secretary Brunner. Although Secretary Brunner is technically a defendant in the caption of

the case, the gist of the lawsuit is to validate her interpretation of Ohio election law as allowing simultaneous registration and absentee voting. This case was admittedly brought as a “fail safe” in case Secretary Brunner lost on the very same arguments in a petition for a writ of mandamus that was pending before and has been ruled on by the Ohio Supreme Court. (See Doc. 1, ¶ 20 & Attachment 1). Indeed, the complaint makes this point explicit:

Although Secretary of State Brunner is named as a Defendant in this action, by virtue of her position as the state’s chief election official, Plaintiffs understand that Brunner’s stated position on the merits is in accord with that taken by Plaintiffs. She is named as a defendant for purposes of ensuring that complete relief may be obtained, particularly in the event that the Secretary of State is ordered in the now-pending state court action before the Ohio Supreme Court to take action that violates the rights of Plaintiffs and other voters under federal law. (Doc. 1, fn. 2).

The only real defendant in this action is the Madison Board of Elections. Having realized after filing their lawsuit that the events complained of did not occur within the Northern District, plaintiffs’ new arguments in their response brief about Secretary Brunner having an office somewhere in the Northern District and the alleged impact of their claims on every voter in the State of Ohio merely expose plaintiffs’ none-too-subtle attempt to “forum shop” and avoid the Southern District. Sadly, it appears that plaintiffs attempted to “game” the system by filing a collusive lawsuit with Secretary Brunner in a venue that they thought might be more favorable than the Southern District of Ohio or the Ohio Supreme Court. Such brazen forum-shopping in important elections cases should not be tolerated by this Court.

Given that two related actions were or are already pending in Central Ohio, discovery and investigation in the actions will overlap, the nature of this suit, the place of the events, the location of the parties and witnesses, and plaintiffs’ apparent forum-shopping efforts, the

litigants' interests and the interests of justice all weigh in favor of the Southern District as a more convenient forum.

II. This Court Lacks Subject Matter Jurisdiction

As set forth in the Board's motion, this Court lacks subject matter jurisdiction because there is no case or controversy between plaintiffs, Secretary Brunner and the Board. The type of dispute that is now before this Court is a hypothetical and contingent dispute, as admitted by plaintiffs in their complaint. See Doc. 1, p. 5, fn. 2. Moreover, all plaintiffs' claims have been resolved by the decision of the Ohio Supreme Court in the case cited to in the complaint, and thus, plaintiffs' claims are moot.

Nor do plaintiffs cite to any case law or authority in their response brief that would support their assertion that they have a case or controversy regarding their claims against the Board. Nowhere in the complaint or their response brief do plaintiffs cite to a case or a federal statute that requires same-day registration and absentee voting. In essence, plaintiffs have "made up" a controversy by falsely construing the Board's intentions. Accordingly, plaintiffs' complaint should be dismissed.

Plaintiffs' arguments regarding Plaintiff Sherie Penix and the other plaintiffs with regard to venue and jurisdiction are no more availing. Plaintiffs admit that Ms. Penix is a Madison County resident (Doc. 37, p. 5). Again, as a resident of Madison County, Ms. Penix should have brought any claims that she had against Madison County in the Southern District of Ohio, not this Court. Project Vote is a Louisiana corporation, and plaintiffs admit that the members of Plaintiffs NEOCH and 1Matters are outside of Madison County, and thus, have no standing to challenge Madison County's interpretation of the directives. (Doc. 37, p. 10).

Conspicuously absent from any mention in plaintiffs' response brief is the other individual plaintiff in the case, Daniel George. This is likely because there are no allegations in the complaint regarding any acts or omissions in this district (or any other district) with regard to Mr. George. Mr. George is a volunteer who works with elderly voters in an Ohio county that is not at issue in the case and which is not alleged to have denied any qualified voters of the rights, privileges and immunities of citizens under the laws of the United States and of the State of Ohio. (Doc. 1, ¶ 1(e) & 25). There are no allegations that he will be injured by the conduct complained of in this case or that he will be treated differently from other qualified absent voters or denied of the right to vote. Consequently, Mr. George neither has standing to bring nor venue to assert any claims in this case against the Board in this district.

III. Conclusion

It is clear that this case is improperly venued in this Court. Plaintiffs' response brief belies plaintiffs' desperation to create allegations regarding residences and state-wide harm that are not alleged in the complaint. Indeed, there are no facts or law to support venue here whatsoever. Because this case is improperly venued and because this Court lacks subject matter jurisdiction, this case should be dismissed. Alternatively, in the interest of justice, this case should be transferred to the Southern District of Ohio, Eastern Division.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 10, 2008, a copy of the foregoing *Memorandum of Points and Authorities in Support of Motion of Defendant Madison County Board of Elections to Dismiss, or in the Alternative, Transfer Venue* was filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. All other parties will be served by regular U.S. mail. Parties may access this filing through the Court's system.

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